under section 11(3) of the Ordinance. On December 31st of the same year the appellant took out an Originating Summons, and both sides filed affidavits. After an abortive trial the matter came before Abbott, J., on 9th November, 1951. There, for the first time, objection was taken to the notice of the 7th October, 1949. The case was heard, and on questions of fact the learned judge found in favour of the appellant but held that the notice was defective in that it did not give the required time to the respondents, and further held that this vitiated the whole proceedings and gave judgment for the respondents. I agree that the notice was defective, but it does not appear to me that this has the consequences which the learned trial judge assumed would follow.

The rights of the creditors are restored by sub-section (1) of section 11. Sub-section (3) is merely procedural. It affords the mortgagor or chargor an opportunity of doing what he is required to do without litigation, but where there is a disputed claim it serves no purpose. Sub-section (5) deals with procedure in disputed claims. This sub-section gives three sets of circumstances in which a mortgagee may proceed by way of an originating summons. One of them is where the mortgagor has not complied with a notice under sub-section (3). But para (c) reads "any difference or dispute having arisen regarding the reinstatement of any security under this section". This is clearly the case here. I think that once there is a dispute a notice under sub-section (3) is in no way obligatory. If in an undisputed case a mortgagee were to proceed by way of originating summons prematurely without issuing a notice, I think that the failure would be adequately dealt with by an appropriate order as to costs.

In any event, I think that a notice under sub-section (3) can be waived and that the respondents, by not raising any objection for two years, during which time many active steps were taken in this litigation, waived any right to object.

I think that the appeal should be allowed with costs, and the appellant given the relief he claimed in the Court below. The deposit in Court will be paid out to the appellant.

Wilson, J., concurred.

Appeal dismissed.

R. S. MOHAMED SULTAN v. LIAK JEE SONG.

[Orig. Civ. Juris. (Buhagiar, J.) July 26, 1952]

[Johore Bahru — Civil Appeal No. 5 of 1952]

Landlord and Tenant — Claim for possession — Res judicata.

This was an appeal from an order of the learned Magistrate of Johore Bahru giving judgment in favour of the plaintiff-respondent for possession of certain premises in Johore Bahru. One of the grounds of appeal was that the claim was barred by **res judicata** as the landlord had brought an earlier action for possession which had failed on appeal. It was also argued that as from the date of the exiry of the notice to quit on which the earlier suit was founded, the appellant became a statutory tenant and that he was entitled to remain in possession unless it could be shown that he had committed a breach of the terms of the tenancy agreement. It was alleged on behalf of the respondent that the appellant had committed a breach of the tenancy agreement as (a) that he had failed to comply with Clause 2 of the tenancy agreement which provided that if the lessor required the premises for his own use the lessee should surrender it at the expiration of one month's written notice (b) that he had failed to comply with Clause 3 of the agreement which provided that the lessee should not sublet the ground floor of the premises without the written consent of the lessor.

Held, (1) that the plea of **res judicata** could not be upheld because firstly the law to be applied in the present case was different from the law applied in the earlier suit and secondly there was a lapse of time between the earlier action and the present action; (2) that Clause 2 of the agreement was inconsistent with the provisions of the Control of Rent Ordinance, 1948 and could not be enforced; (3) that the breach of the agreement against subletting had been waived by the respondent's accepting rent from the appellant with full knowledge of the position and (4) that the appellant was entitled to remain in possession as a statutory tenant of the premises.

K. E. W. Hatchard for the defendant-appellant.

C. F. J. Ess for the plaintiff-respondent.

Cur. Adv. Vult.

Buhagiar, J. : — This is an appeal from an order of the learned Magistrate of Johore Bahru in Civil Suit No. 60 of 1950 giving judgment in favour of the plaintiff-respondent for possession of the ground floor of premises No. 36 Jalan Dhoby, Johore Bahru, occupied by the defendant-appellant.

The facts are as follows: Liak Jee Song, the respondent, is the tenant of premises No. 36 Jalan Dhoby, Johore Bahru. R. S. Mohamed Sultan, the appellant, became a sub-tenant of the ground floor of those premises, by virtue of an agreement dated the 5th June 2602 (1942) at a monthly rental of $40 on a month to month tenancy. This agreement included the following two clauses :—

"2. The said lessee hereby covenants with the lessor that in the event of the said lessor requiring the ground floor of the said premises for his own business or use, the lessee shall surrender and deliver up possession of the said premises to the lessor without any compensation whatsoever, at the expiration of one month's written

notice to be served on the lessee at his usual place of residence.

3. The said lessee hereby agrees that during the continuance of this agreement he shall not sub-let the ground floor of the said premises nor any part thereof to any person or persons without the written consent of the said lessor."

The respondent sent to the appellant a notice in writing to quit dated the 26th October, 1949, requiring the appellant to quit and deliver up possession of the whole of the ground floor of the said premises on the 30th day of November, 1949, (or at the expiration of the month of the appellant's tenancy expiring next after the end of one calendar month from the time of service of the notice).

The appellant has paid and the respondent has accepted rent at the rate of $40 per month until the end of November, 1949.

On Application No. 19 made by the respondent to the Rent Assessment Board, that Board made an order dated the 12th July, 1950, whereby the respondent was granted permission to apply to the Court for ejectment of the appellant from the ground floor of the said premises.

The respondent applied to the Magistrate's Court for possession of the ground floor of the said premises under section 13(1)(b) of the Control of Rent Ordinance, 1948, his claim being based on the fact that the appellant had committed a breach of clauses 2 and 3 of the agreement of the 5th June, 1942, in that:—

(a) the appellant, in spite of the repeated verbal demands made by the respondent, the first of which was made some time in February, 1946, to surrender the ground floor of the said premises, had refused to do so and was still in occupation of the ground floor of the said premises; and

(b) the respondent had discovered that there was a cigarette-stall on the premises some time between September and October, 1942, but thought that it belonged to the appellant and it was only in the early part of 1946 that he (the respondent) came to know that the cigarette-stall in question belonged to another party who paid and was still paying rent to the appellant.

In view of the plea of *res judicata* raised by the appellant as part of his defence, it is important to refer to proceedings between the present parties prior to the institution of the present suit. Documentary evidence was produced to prove the following facts:

By Civil Suit No. 5 of 1948 in the District Court of Johore Bahru, the respondent instituted proceedings against the appellant for the recovery of possession of the whole of the ground floor of the said premises. The suit was dismissed with costs, the respondent being at liberty to bring a fresh suit as he may be advised. The respondent's claim in that suit was based on the fact that on or about the 31st March, 1948, he had served on his tenant a notice requiring him to quit and deliver up possession of the ground floor of the said premises.

The respondent brought a fresh suit later in 1948 (Civil Suit No. 11 of 1948) in the District Court of Johore Bahru for the recovery of the said ground floor. The ground of the claim was that the tenancy had been duly determined by a notice in writing to quit dated the 27th October, 1948, expiring on the 30th November, 1948. The appellant was ordered to give up possession to the respondent of the ground floor on or before the 30th April, 1949. The appellant appealed against this order.

Before the order of the Court of Appeal was made the following correspondence was exchanged between the solicitors of the parties:—

"Singapore,
20th May, 1949.

Dear Sir,

J. B. Civil Suit No. 11 of 1948.

LIAK JEE SONG
vs.
R. S. MOHAMED SULTAN.

We are instructed by our client to request your client to withdraw the Appeal herein. Our client will not execute the Judgment obtained by him against your client herein and will also not claim any costs against your client, each party to pay his own costs and your client may continue occupying premises as our client's tenant on the same terms and conditions as set out in the tenancy agreement dated 5th June, 1942.

We shall be glad to hear from you.

Yours faithfully,
Sd. Richard Chuan Hoe Lim & Co."

"No. 43, Jalan Ibrahim,
Johore Bahru,
23rd May, 1949.

Dear Sirs,

J. B. Civil Suit No. 11 of 1948.

LIAK JEE SONG
vs.
R. S. MOHAMED SULTAN.

I am in receipt of your letter of the 20th instant.

My client is not agreeable to your suggestion in your letter under reply. However the matter can be settled on the following terms:—

(a) By consent appeal to be allowed and the judgment of the Court below set aside.

(b) Agreed costs for the appeal of the Court below to be agreed costs fixed at $200 for the costs of the appeal and Court below to be paid by the respondent to the appellant.

If these terms are agreed, please let me know by 3 p.m. tomorrow as otherwise the appeal has to be argued on the 28th instant.

Yours faithfully,
Sd. A. N. Mitra."

By consent it was ordered by the Court of Appeal that the appeal be allowed.

The first plea raised by the appellant was that the claim for possession of the premises was barred by *res judicata*. It was submitted that the suit brought by the respondent in 1948 dealt with a matter which is directly and substantially in issue between the same parties in the present suit and section 6 of the Civil Procedure Code applied. The learned Magistrate in his grounds of judgment held that the defence of *res judicata* is not maintainable; he gave, however, no reason for holding so.

Except for the lapse of time, the matter in issue in this suit and in the 1948 suit is the same; the plaint in the present suit is different in that the respondent is relying in his claim for possession on the breach alleged to have been committed by the appellant of clauses 2 and 3 of the 1942 tenancy agreement; this, however, is no objection to estoppel by *res judicata* because such breach is a matter which might have been made a ground of attack in the former suit (see explanation III in section 6 of the Civil Procedure Code); the breach was known to the respondent when he instituted the 1948 suit. There are, however, two reasons why the plea of *res judicata* cannot be upheld, namely:—

(a) the fact that the law to be applied in the present suit is different from the law applied in the 1948 suit; and
(b) the lapse of time.

With regard to point (a), the law to be applied in the present case is the Control of Rent Ordinance, 1948; this Ordinance repealed the Increase of Rent (Restriction) Enactment, 1939, Johore (No. 25 of 1939) which was in force in Johore when the 1948 suit was before the Court; there are many novel provisions in the 1948 Ordinance which were not in the former Johore Enactment and which, therefore, could not be in issue in the 1948 suit.

With regard to point (b), I think it would not be logical to hold that once a landlord has lost a suit in which he asked for the recovery of premises he may never at any later date bring a new suit for such recovery. A landlord who without fresh grounds keeps on bringing suits year after year for the recovery of possession would of course be liable to have his suits dismissed as being vexatious litigation.

One substantial point of difference between the 1948 suit and the present suit is the lapse of time; the 1948 suit was based on a notice to quit served during that year; the present suit is based on another notice to quit; I have found no authority either for or against (and none was quoted to me by counsel) the proposition that the fact that a fresh notice to quit has been served is a factor which makes the matter directly or substantially in issue different from that in a former suit; the only indirect authority is a reference to *Whelan v. Henning*[1] in an article on "*Res Judicata* by Implication" in the Law Times Vol. 208 p. 5 at p. 6; there in dealing with *Hoystead v. Taxation Commissioner*[2] it is stated: "No point seems to have been taken, as was taken in *Whelan v. Henning*[1], that in regard to income tax a question relating to a subsequent year was not the same thing as that relating to a previous year although all the relevant factors might be the same." But apart from this I consider that there may be changes of circumstances from year to year independent of the conduct or will of the landlord or tenant which may mane it reasonable that an order or judgment be made or given for recovery of possession of premises.

One point which may conveniently be dealt with here is the ground of appeal (which was not argued before the learned Magistrate) that the subsisting tenancy between the appellant and the respondent was not validly terminated prior to the commencement of this suit; section 12 of the Control of Rent Ordinance, 1948, has not been complied with because the respondent did not seek the permission of the Rent Assessment Board *prior* to the giving of the notice to quit; such permission was obtained after the notice to quit had been served and only before institution of proceedings for recovery of possession of the premises. I think section 12 of the Ordinance is clear; that section requires the permission of the Board only before the landlord can eject or apply to the Court for an order of ejectment of his tenant from any premises; the notice to quit is not an ejectment and is not an application to the Court for ejectment; it is only a means of determining the tenancy.

In his defence the appellant also pleaded that as from the 1st December, 1948, he has been in possession of the ground floor of the said premises as a statutory tenant and that when the appeal in the 1948 suit was allowed by consent it was understood between the parties that the appellant would occupy the said ground floor as an ordinary tenant and not as a tenant on the

terms and conditions as set out in the tenancy agreement of 1942. The learned Magistrate held that he was satisfied on the evidence that the agreement of 1942 had never been at any time cancelled, repudiated or varied in any manner.

I consider that the tenancy was terminated by the notice to quit dated the 27th October, 1948, determining the tenancy on the 30th November, 1948. As from the 1st December, 1948, therefore, the appellant became a statutory tenant under the provisions of section 15(a) of the Control of Rent Ordinance, 1948. I do not consider, however, that the correspondence referred to above exchanged between the solicitors of the parties before the order allowing the appeal by consent in the 1948 suit had the effect of altering the terms of the agreement of 1942.

Mr. Hatchard for the appellant argued before me that by the letter dated the 23rd May, 1949, by the appellant's solicitors in reply to the letter dated the 20th May, 1949, by the respondent's solicitor, the appellant did not accept the terms suggested in the last mentioned letter which contained, *inter alia,* the suggestion that the appellant would continue to occupy the premises "on the same terms and conditions as set out in the tenancy agreement dated 5th June, 1942." I do not consider that from the order of the Court of Appeal which incorporates the terms in the above mentioned letter of the 23rd May, 1949, it can be implied that the terms of the tenancy agreement of 1942 were in any way affected.

In my opinion, therefore, as from the 1st December, 1948, the appellant was a statutory tenant in accoridance with the provisions of section 15(a) of the Control of Rent Ordinance, 1948.

Now in asking for recovery of possession, the respondent is relying on section 13(1)(b) of the Control of Rent Ordinance, 1948; he contends that there has been a breach of clauses 2 and 3 of the 1942 tenancy agreement.

With regard to clause 2, I consider that the obligation thereby imposed is inconsistent with the provisions of the Control of Rent Ordinance, 1948; this point has been settled by the Court of Appeal in *Remon v. City of London Real Property Company, Limited*[3] where Scrutton, L.J., at p. 57 said :—

> "The Act of 1920 (i.e. the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which is very similar to our Control of Rent Ordinance, 1948) has made some progress in the development of this new statutory tenancy.
>
> Under the original Acts the statutory tenant was allowed to stay if he 'performed the other conditions of the tenancy.' But one of those conditions might be to give up the premises at the expiration of the tenancy by agreement. To insist on this as a condition would be to render the whole Act nugatory, and Astbury, J. in Artizans Dwelling Co. v. Whitaker (1919) 2 K.B. 301, 304) held that this part of the conditions of the tenancy was inapplicable."

With regard to clause 3, there is evidence to show that the respondent knew that the appellant had sub-let part of the premises as far back as 1946 and since then he has, with this knowledge, accepted rent until November, 1949. There are various authorities for the proposition that a landlord loses his right to possession for a breach committed by the tenant in sub-letting the premises without the landlord's consent if he accepts rent after the breach of the agreement. (*Morman v. Simpson*[4] applied in *Dudley & District Benefit Building Society v. Emerson & Anor.*[5]). (See also *Hyde v. Pimley & Ors.*[6]). I hold, therefore, that the breach of the agreement against sub-letting had been waived by the respondent's accepting rent from the appellant with the full knowledge of the position.

It is also important to point out that under section 13(1)(b) of the Control of Rent Ordinance, 1948, no order or judgment is to be made or given unless the Court considers it reasonable to do so. Apart from the fact that the respondent cannot succeed under the provisions of the said section for the reasons set out above, no evidence has been produced by the respondent to show that there are circumstances which make it reasonable for an order to be made for the recovery of possession of the appellant's premises.

For the above reasons I allow the appeal with costs here and in the Court below, and I reverse the order of the Court below.

Appeal allowed.

RM. THIRUPPATHI CHETTIAR & ANOR.
v.
TEH KEONG KHENG.

[Court of Appeal (Mathew, C.J. (F.M.), Sir Charles Murray-Aynsley, C.J. (Singapore) and Buhagiar, J.) July 24, 1952]

[Kuala Lumpur — Civil Appeal No. 12 of 1952]

Japanese Judgments and Civil Proceedings Ordinance, 1946 — Executors — Agreement for the sale of land subject to conditions — Civil Procedure Code, s.s. 467(i)(f), 469(a).

This was an appeal from the judgment of Wilson, J. reported at p. 46 ante.

During the Japanese occupation of Malaya, by an agreement in writing dated June 1st, 1945, the administrator with will annexed agreed to sell land subject to his obtaining the approval of the Japanese High Court and subject to the defendant obtaining the approval of the Japanese Governor. The approval of the Court was obtained and an application to the Governor was made but the approval was never received, as soon after, the Japanese surrendered. In November 1945 the plaintiffs became administrators of the deceased and they sought a declaration that the agreement was null and void and of no effect on the grounds that: (i) the application to sell was made ex parte and no notice of it was served on or given to any person beneficially interested: (ii) the order of the Japanese did not approve the sale to the defendant specifically; and (iii) the approval of the Japanese Governor was not obtained.

The learned trial Judge held that he had no power in these proceedings to set aside the order of the Japanese Court and that the appropriate machinery was to institute proceedings under the Japanese Judgments and Civil Proceedings Ordinance. No such proceedings were taken under this Ordinance. The claim was dismissed. Against this decision the plaintiffs appealed. On the appeal the Counsel for the appellants relied on two points (i) the application to the Japanese Court for permission to sell was ex parte and therefore a nullity, and (ii) the approval of the Japanese Governor to sale was never obtained.

Held, dismissing the appeal (i) that the learned trial Judge held rightly that the appellants could not by means of these proceedings circumvent the provisions of the Japanese Judgments and Civil Proceedings Ordinance, 1946, and that the Judgment of the Japanese Court must still be deemed to be effective; (ii) that the Japanese Governor of Selangor never refused approval of the purchase.

COURT OF APPEAL.

R. V. H. Rintoul for the appellants.

H. Y. Teh for the respondent.

Cur. Adv. Vult.

The Judgment of the Court was delivered by Mathew, C.J., (F.M.), with which Sir Charles Murray-Aynsley, C.J., (Singapore), and Buhagiar, J., concurred.

Mathew, C.J. (F.M.) : — The facts in this case are fully set out in the judgment of the learned trial judge against which judgment the appellants are now appealing. The main purpose of the case was to obtain a declaration that a written agreement concerning the sale of certain lands to the defendant dated the 1st June, 1945, was null and void and of no legal effect.

Counsel for the appellants relies or two points : (i) the application to the Japanese Court for permission to sell was *ex parte* and therefore a nullity, and (ii) the approval of the Japanese governor to the sale was never obtained.

As regards the first point, the learned trial judge held that he had no power in these proceedings to set aside the order of the Japanese Court. The appropriate machinery for enabling the Court to do this is provided under the Japanese Judgments and Civil Proceedings Ordinance No. 29 of 1946. No proceedings were taken under this Ordinance. The trial judge held rightly in my opinion that the appellants could not by means of these proceedings circumvent the provisions of Ordinance No. 29 of 1946, and that the judgment of the Japanese Court must still be deemed to be effective.

As regards the second point, the Japanese governor of Selangor never refused approval of the purchase. An application had been made to him for his approval, but before the approval had been obtained the war with Japan was over and the Japanese governor had left the State.

The appellants are setting up the default of their predecessors in title as a basis for this claim. The order of the Japanese Court was obtained by them and is binding on the present appellants.

I would dismiss the appeal with costs, and order that the deposit in Court be paid out to the respondent against his costs.

Appeal dismissed.

AV. PL. PALANIAPPA CHETTIAR
v.
KOH KEH HONG.

[Court of Appeal (Mathew C.J. (F.M.), Sir Charles Murray-Aynsley, C.J. (Singapore) and Wilson, J.) July 24, 1952]

[Kuala Lumpur — Civil Appeal No. 9 of 1952]

Land — Sale of — Mortgage outstanding — Attornment of tenants to purchaser — Registrable transfer — Variation of written contract by conduct — Abandonment of relief prayed for — Discretion of Court.

This was an appeal against the judgment of Abbott, J. reported sub nom Koh Keh Hong v. Av. Pl. Palaniappa Chettiar (1952) M.L.J. 29.

In this case the defendant-appellant agreed to sell to the plaintiff three parcels of land. A document of transfer was executed by the defendant and given to the plaintiff. The purchase price was handed over to Mr. Yong Sze Lin who held it as stake holder. The lands